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No. 84-251

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

ELDEE EDWARDS, JR., *et al.*,
*Petitioners,*

v.

CONSOLIDATED RAIL CORPORATION,
*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether there exist special and important reasons why this Court should exercise its discretion and grant of writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit which affirmed the granting of a summary judgment by the United States District Court for the District of Columbia in light of the Court's adherence to the controlling local law on the issue and the absence of any conflict between this decision and any other applicable decision?

## LISTING OF CORPORATE AFFILIATIONS

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondent herein discloses the following subsidiaries (except wholly owned subsidiaries) and affiliates of Consolidated Rail Corporation, with the percentage of stock interest held by Respondent noted in parentheses: The Akron & Barberton Belt Railway Company (50%); Albany Port Railway Corporation (50%); The Best Railway Company of Chicago (15.38%); Calumet Western Railway Company (25%; 50% of this company is owned by Indiana Harbor Belt Railroad Company, a subsidiary of Respondent); The Canada Southern Railway Company (71.44%); Chicago & Western Indiana Railway (20%); Fruit Growers Express Company (23.52%); Indiana Harbor Belt Railroad Company (51%); The Lake Erie & Eastern Railroad Company (50%); The Lakefront Dock and Railroad Terminal Company (50%); The Monongahela Railway Company (33.33%); Nicholas, Fayette & Greenbrier Railroad Company (50%); Peoria & Pekin Union Railway Company (25.64%); Pittsburgh Chartiers & Youghiogheny Railway Company (50%); Terminal Railroad Association of St. Louis (12.5%); Toledo Terminal Railroad Company (42.87%; Trailer Train Company (4.88%).

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### REFERENCE TO OFFICIAL REPORT OF OPINION

The trial court's opinion, since reported at 567 F. Supp. 1087 (D.D.C. 1983), the judgment of the United States Court of Appeals affirming on the basis of the District Court's opinion and the denial of the petition for rehearing *en banc* are set forth in the Appendix to the Petition.

### JURISDICTION

The petition herein is predicated upon this Court's certiorari jurisdiction. 28 U.S.C. § 1254(1).

### STATEMENT OF THE CASE

On July 7, 1979, the minor plaintiff, Eldee Edwards, (hereinafter "plaintiff") was injured as the result of mak-

ing contact with an electrified catenary wire which was suspended above the defendant's railroad tracks in an area adjacent to the Anacostia River within the District of Columbia. Plaintiff gained access to the track area via a road which bore a sign which read, "No Unauthorized Vehicles." Access to the overhead electric wire was gained by climbing to the top of a car of a temporarily stopped train. (J.A. 12-14)

The track area where this incident occurred is bordered by a multi-lane highway with high walls between the site and the closest housing, a fenced cemetery, the Anacostia River, a railroad bridge and a tunnel. (J.A. 13, 89) The tracks are mainline or through tracks. Trains are not stored, loaded or switched in the area and only stop there when required to by signals for operational purposes. (J.A. 16-17)

The catenary system in the District of Columbia was installed in the mid-1930s and has been in place since then. (J.A. 17) The catenary wire at the subject location is suspended 18½ feet above the railroad tracks and is "ordinarily inaccessible." The wires provide power to electrical trains through devices mounted atop the locomotives. Of necessity, the wires are uninsulated. (J.A. 17)

Present in the area were "No Trespassing" warnings which, if obeyed, protect against the many dangers associated with railroad tracks. (J.A. 98) Other precautions relating to the presence of electricity are not undertaken in areas such as the one in question where the risk of harm from contact with an electrical wire is not reasonably foreseeable. (J.A. 76) .

Upon the conclusion of voluminous discovery, defendant below filed a motion for summary judgment. After

reviewing the motion and the papers submitted in opposition thereto, hearing oral argument, and conducting its own thorough review of the entire record, the trial court concluded that there was no dispute as to any material fact, and that under the law of the District of Columbia plaintiff was not entitled to recover. Accordingly, the trial court ruled that defendant was entitled to judgment as a matter of law, which ruling was affirmed by the Court of Appeals.

## SUMMARY OF ARGUMENT

Petitioners' contention that the decision below is in conflict with this Court's decision in *Best* v. *District of Columbia*, 291 U.S. 411 (1934), and pre-1971 decisions from the U.S. Court of Appeals for the District of Columbia Circuit, made in an apparent attempt to invoke the jurisdiction of this Court under Supreme Court Rule 17(a), is incorrect. Those decisions must be viewed in their proper historical context in regard to the pre-District of Columbia Court Reorganization role of the federal judicial system vis-a-vis that of the District of Columbia. The decision below is in conformity with the law of the District of Columbia as announced by the District of Columbia Court of Appeals in *Holland* v. *Baltimore & Ohio R. Co.*, 431 A.2d 597 (D.C. App. 1981), and the court below correctly applied local law in the exercise of its diversity jurisdiction. There are no special and important reasons why this Court should consider a review of the District of Columbia's adoption of Section 339 *Restatement (Second) of Torts*.

Petitioners' assertion that the District of Columbia has by statute imposed strict liability against the Respondent railroad is not correct because strict liability statutes do not apply to trespassers. Moreover, the Court correctly

construed the statute in question to be one which does not impose strict liability.

Finally, petitioners' assertion that respondent is liable for maintaining a hidden engine of destruction is unfounded and improper, and was not raised at the trial court level.

## ARGUMENT

### I

### The Decision Below Properly Applied Local Law

This case turns solely upon the application of the local law of the District of Columbia. Petitioners contend that the decision below conflicts with the decision of this Court in *Best*, *supra*, and its progeny in the federal court of appeals sitting in the District of Columbia, whereas respondents contend that the applicable law was enunciated by the District of Columbia Court of Appeals in *Holland*, *supra*. It is unnecessary to reiterate here the history and significance of court reorganization in the District of Columbia as this Court has previously fully treated these matters. *See*, *Key* v. *Doyle*, 434 U.S. 59 (1977). Instead, it is sufficient to say that as of February 1, 1971, the District of Columbia Court of Appeals became the highest court of the District of Columbia. Pre-February 1, 1971 decisions of the federal circuit court continued to be the law of the District of Columbia, and the D.C. Court of Appeals, in order to facilitate the orderly transaction to the federal-state dichotomy, adopted the rule that those decisions would remain the law of the District of Columbia until overruled by its *en banc* decisions. *M.A.P.* v. *Ryan*, 285 A.2d 310 (D.C. App. 1971).

In *Holland*, *supra*, the *en banc* D.C. Court of Appeals adhered to the pre-1971 common-law "trespasser doctrine," and, with respect to children trespassers, adopted

§ 339 of the *Restatement (Second) of Torts* as the law of the District of Columbia.

Thus, the lower court's decision based on § 339 of the *Restatement (Second)* was a proper application of local law and does not conflict with earlier decisions of this Court or any federal court of appeals as regards the law of the District of Columbia.

## II

### The Decision Below Was Clearly Correct

Petitioners contend that the Court below misinterpreted a District of Columbia statute which they assert makes the respondent railroad strictly liable in tort. Petitioners also allege that the court failed to recognize the catenary system as a "hidden engine of destruction" which would enable plaintiff to recover despite his status as a trespasser.

Petitioners' interpretation of the statute[1] is not correct. However, even if it were, it would not change the result reached below or be a matter which this Court should consider, as Section 520B of the *Restatement (Second) of Torts* specifically excludes trespassers from those classes of persons entitled to recover under strict liability. The statute by its terms is limited to the territorial confines of the District of Columbia and was thoroughly analyzed by the district court. (J.A. 33-35) This court has many times commented that it will not ordinarily review the decisions of the federal court for the District of Columbia circuit in cases based on the statutes and common law of the District of Columbia. *Del Vecchio* v. *Bowers*, 296 U.S. 280, 285 (1935); *District of Columbia* v. *Pace*, 320 U.S. 698,

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[1] D.C. Code § 7-1434 (1981 Ed.), Act of March 27, 1934 (48 Stat. 506).

702 (1944); *Busby* v. *Electric Utilities Employees Union*, 323 U.S. 72, 74-75 (1944); and *Fisher* v. *United States*, 328 U.S. 463, 476 (1946).

The initial flaw in petitioners' contention that the overhead wire was a "hidden engine of destruction" is that the argument was not raised in the trial court, was impermissibly attempted to be raised for the first time on appeal and was not a proper issue for appellate consideration. *Browzin* v. *Catholic University of America*, 527 F.2d 843, 849, at fn. 10 (D.C. Cir. 1975). Notwithstanding this deficiency, the argument is not well taken. Respondent's lawful activity in utilizing electrical current to provide power for its trains is not an "engine of destruction" created to injure a trespasser, such as a springgun or mantrap for which liability could be imposed. *United States Zinc & Chemical Co.* v. *Britt*, 258 U.S. 268 (1922). A landowner is not bound to provide for a trespasser's safety from undisclosed danger. He is only prohibited from intentionally laying traps for the purpose of injuring trespassing persons. *Erie R. Co.* v. *Hilt*, 247 U.S. 97 (1918).

## III

### There Are No Special And Important Reasons For Granting The Writ Of Certiorari

This case involves no national issue or application of any law beyond the District of Columbia. The grant of the writ of certiorari would only serve to invite litigants to seek review of the thousands of cases applying the local laws of the District of Columbia. The trial court's extensive analysis and opinion has been reviewed by the appellate court which also denied rehearing and petitioners' suggestion for rehearing *en banc*. Respondent submits that this case is one which demonstrates a litigant's unwillingness to rest content with an adverse decision

and unsuccessful appellate review. No valid reason exists why further review should be undertaken by this Court.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that three copies of the foregoing Brief In Opposition To Petition For Writ of Certiorari were mailed, first class, postage prepaid to Van S. Poweers, Esq., Attorney for Petitioners, 4344 Farragut Street, Hyattsville, Maryland 20781, on this 14th Day of September, 1984.

STEPHEN A. TRIMBLE